

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KYLE PETERSEN,
Plaintiff,
v.
MEKIASH BUYARD,
Defendant

Case No. 1:20-cv-00999-DAD-EPG

ORDER GRANTING MOTION TO
PROCEED WITH CASE

(ECF No. 12)

FINDINGS AND RECOMMENDATIONS
THAT THIS CASE BE DISMISSED, WITH
PREJUDICE, BASED ON RES JUDICATA
AND FAILURE TO STATE A CLAIM

(ECF No. 1)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE (21) DAYS

Plaintiff, Kyle Petersen, is proceeding *pro se* and *in forma pauperis* in this civil rights action, filed on July 20, 2020, pursuant to 42 U.S.C. § 1983. (ECF No. 1.) The complaint alleges that Mekisha Buyard, a California Department of Correction and Rehabilitation Parole Agent, violated his Fourth Amendment rights by unlawfully searching the contents of his various cell phones.

Plaintiff filed a civil action on the same allegations against the same Defendant in Case No. 19-cv-235. (Case No. 19-cv-235, ECF No. 1). That case was dismissed by a final judgment on the merits on December 17, 2019. (ECF Nos. 21, 22; *see* ECF No. 16).

Additionally, the constitutionality of some of the searches at issue in the instant case was litigated by Plaintiff on appeal of his underlying criminal conviction, with the Ninth Circuit

1 concluding that “the parole searches were constitutionally permissible.” *United States v.*
2 *Peterson*, 995 F.3d 1061, 1068 (9th Cir. 2021).

3 Because Plaintiff’s complaint is barred by res judicata and also fails to state any
4 cognizable claim, the Court recommends dismissal of this civil action with prejudice and the
5 denial of leave to amend.

6 Objections are due within 21 days of service of these findings and recommendations.

7 **I. MOTION TO PROCEED WITH THE CASE**

8 The District Court previously stayed this case pending the Ninth Circuit’s decision
9 regarding Plaintiff’s criminal appeal. (ECF Nos. 7, 9).

10 The Ninth Circuit has since issued its decision, affirming the District Court, *see United*
11 *States v. Peterson*, 995 F.3d 1061 (9th Cir. 2021), the stay has been lifted, and Plaintiff filed a
12 “motion informing the Court of Plaintiff’s wish to proceed in this action.” (ECF No. 12).
13 Although Plaintiff was required to only file “a statement regarding whether he wishes to
14 proceed in this action,” not a motion, the Court will grant the motion to proceed with this case
15 and screen the complaint. (ECF No. 9, p. 2; ECF No. 12).

16 **II. SCREENING REQUIREMENT**

17 The Court is required to screen complaints brought by inmates seeking relief against a
18 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
19 The Court must dismiss a complaint or portion thereof if the inmate has raised claims that are
20 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
21 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
22 § 1915A(b)(1), (2).

23 As Plaintiff is proceeding *in forma pauperis*, the Court also screens the complaint under
24 28 U.S.C. § 1915. Under 28 U.S.C. § 1915(e)(2), in any case in which a plaintiff is proceeding
25 *in forma pauperis*, the Court must conduct a review of the complaint to determine whether it
26 “state[s] a claim on which relief may be granted,” is “frivolous or malicious,” or “seek[s]
27 monetary relief against a defendant who is immune from such relief.” If the Court determines
28 that the complaint fails to state a claim on which relief may be granted, it must be dismissed.

1 *Id.* Leave to amend may be granted to the extent that the deficiencies of the complaint can be
2 cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

3 A complaint must contain “a short and plain statement of the claim showing that the
4 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
5 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
6 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
7 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient
8 factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Iqbal*, 556 U.S.
9 at 663 (quoting *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal
10 conclusions are not. *Id.* at 678.

11 In determining whether a complaint states an actionable claim, the Court must accept
12 the allegations in the complaint as true, *Hosp. Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S. 738,
13 740 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff,
14 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s
15 favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* plaintiffs “must be
16 held to less stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627
17 F.3d 338, 342 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally
18 construed after *Iqbal*).

19 **III. SUMMARY OF PLAINTIFF’S COMPLAINT**

20 Plaintiff was released from prison to a parole term. (See ECF No. 1 at 5.) As part of his
21 parole, Plaintiff was required to comply with certain terms and conditions. (*Id.*). One of the
22 parole conditions provided as follows:

23 You, your residence, and any property under your control are subject to search
and seizure by a probation officer, an agent or officer of the California
24 Department of Corrections and Rehabilitation, or any other peace officer at any
time of the day or night, with or without a warrant with or without cause.

25 (*Id.*)

26 On May 23, 2017, while Plaintiff was on parole, Defendant “searched Plaintiff’s
27 [Unimax] cell phone without a warrant.” (ECF No. 1, p. 2). As part of this search, “Defendant
28

1 accessed the internet ‘browser’ . . . opened Plaintiff’s Facebook account and searched it, and
2 opened and searched Plaintiff’s account on ‘Plenty of Fish;’ a dating application.” (*Id.* at 2-3).
3 “On July 6, 2017, Defendant searched Plaintiff’s LG cell phone without a warrant” opening and
4 searching “several social media applications.” (*Id.* at 3). And, “[o]n August 2, 2017, September
5 6, 2017, October 5, 2017, and October 21, 2017, Defendant searched a total of five of Plaintiff’s
6 cell phones. In each of these searches, Defendant accessed social media accounts.”¹ (*Id.*).

7 Plaintiff argues that the search of his devices and the social media accounts (which he
8 refers to as “remote ‘cloud’ data”) was not permitted under his agreed conditions of parole and
9 that Defendant thus impermissibly searched his cell phones and their content without a warrant
10 in violation of the Fourth Amendment. (*Id.* at 10). Plaintiff seeks a total of \$2,800,000 in
11 punitive damages and \$350 in compensatory damages. (*Id.* at 13).

12 Aside from the above allegations in the complaint, Plaintiff notes the dismissal of his
13 prior case against *Buyard*, Case No. 19-cv-235. (*Id.* at 3). Notably, after recounting the
14 dismissal of that case, he states: “After careful research, Plaintiff has found that the court was
15 incorrect.” (*Id.* at 4). He then argues that his parole conditions did not permit the search of his
16 cell phones and their content. (*See id.* at 10-13).

17 **IV. PRIOR CIVIL CASE**

18 Plaintiff commenced his prior civil action against Defendant *Buyard* on February 19,
19 2019. (Case No. 19-cv-235, ECF No. 1). Plaintiff filed a first amended complaint on March 14,
20 2019. (Case No. 19-cv-235, ECF No. 8). The Court struck the first amended complaint because
21 it was not signed by Plaintiff and instructed him to file an amended complaint bearing his
22 signature. (Case No. 19-cv-235, ECF No. 9). On April 1, 2019, Plaintiff filed a second
23 amended complaint (Case No. 19-cv-235, ECF No. 10), and on September 9, 2019, Plaintiff
24 lodged a third amended complaint (Case No. 19-cv-235, ECF No. 13).

25 The third amended complaint brought claims against Defendant for allegedly violating
26 Plaintiff’s Fourth Amendment rights in connection with the warrantless parole searches of his
27

28 ¹ Plaintiff speculates that a sixth phone may have been searched without a warrant but states that he will
not know for sure until he is able to obtain discovery.

1 cell phones, including the searches of his Unimax and LG cell phones, “four or five [other] cell
2 phones,” and social media data (e.g., Facebook) contained on his cell phones. (Case No. 19-cv-
3 235, ECF No. 17, pp. 3-4). This Court issued findings and recommendations, recommending
4 that the case be dismissed without leave to amend under *Heck v. Humphrey*, 512 U.S. 477
5 (1994) and because the searches of the cell phones and their contents fell within the terms of
6 his parole conditions. (Case No. 19-cv-235, ECF No. 16). The District Court adopted the
7 findings and recommendations, dismissing the case on the merits in a judgment entered on
8 December 17, 2019. (Case No. 19-cv-235, ECF Nos. 21, 22). Plaintiff moved for
9 reconsideration, and the District Court denied the motion. (Case No. 19-cv-235, ECF Nos. 23,
10 24). Plaintiff did not file an appeal of the dismissal.

11 **V. NINTH CIRCUIT DECISION REGARDING CRIMINAL CASE**

12 Plaintiff pled guilty in his underlying criminal case, reserving the right to appeal the
13 denial of his motion to suppress the evidence seized from the May 23, 2017, and July 6, 2017
14 parole searches of his Unimax and LG cell phones.²

15 On appeal, Plaintiff challenged the denial of his motion to suppress these parole searches.
16 His opening brief specifically argued that the parole conditions did not extend to the cell phones
17 or their contents, including his social media data obtained from platforms like Facebook.
18 (Appellate Case No. 19-10246, ECF No. 9, p. 34-41). The Ninth Circuit concluded that Plaintiff
19 had a diminished expectation of privacy as a parolee and thus the district court was correct in
20 denying his motion to suppress. *Peterson*, 995 F.3d at 1068. Plaintiff filed a petition for
21 rehearing *en banc*, which was denied on August 2, 2021. (Appellate Case No. 19-10246, ECF
22 Nos. 36, 40, 41). The mandate has also issue regarding rehearing *en banc*.

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24 ² The Court may take judicial notice of its own records in other cases, *United States v. Wilson*, 631 F.2d
25 118, 119 (9th Cir. 1980). The Court takes judicial notice of Plaintiff’s underlying criminal case, *United
26 States v. Peterson*, No. 1:17-cr-255-LJO-SKO, that arose out of the seizure and parole searches of two
27 of the cell phones at issue in the present case—the Unimax cell phone searched on May 23, 2017, and
28 the LG cell phone searched on July 6, 2017. The Court also takes judicial notice of Plaintiff’s appellate
case, *United States v. Peterson*, Case No. 19-10246, and other civil action before this Court, *Petersen v.
Buyard*, Case No. 19-cv-235-DAD-EPG. Additionally, the Court notes that Plaintiff (Petersen) also goes
by “Peterson,” which is why the latter spelling is used in his criminal cases.

1 **VI. ANALYSIS**

2 **A. Legal Standards**

3 **1. Section 1983**

4 The Civil Rights Act under which this action was filed provides:

5 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of
6 any State or Territory or the District of Columbia, subjects, or causes to be subjected, any
7 citizen of the United States or other person within the jurisdiction thereof to the
deprivation of any rights, privileges, or immunities secured by the Constitution and laws,
shall be liable to the party injured in an action at law, suit in equity, or other proper
proceeding for redress

8 42 U.S.C. § 1983.

9 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
10 method for vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 U.S. 386,
11 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)); *see also Chapman*
12 *v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979); *Hall v. City of Los Angeles*, 697
13 F.3d 1059, 1068 (9th Cir. 2012); *Crowley v. Nevada*, 678 F.3d 730, 734 (9th Cir. 2012);
14 *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006).

15 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
16 color of state law, and (2) the defendant deprived him of rights secured by the Constitution or
17 federal law. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *see also*
18 *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of
19 state law”). A person deprives another of a constitutional right, “within the meaning of § 1983,
20 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an
21 act which he is legally required to do that causes the deprivation of which complaint is made.’”
22 *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting
23 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be
24 established when an official sets in motion a ‘series of acts by others which the actor knows or
25 reasonably should know would cause others to inflict’ constitutional harms.” *Preschooler II*,
26 479 F.3d at 1183 (quoting *Johnson*, 588 F.2d at 743). This standard of causation “closely
27 resembles the standard ‘foreseeability’ formulation of proximate cause.” *Arnold v. Int'l Bus.*
28

1 *Mach. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *see also Harper v. City of Los Angeles*, 533
2 F.3d 1010, 1026 (9th Cir. 2008).

3 Additionally, a plaintiff must demonstrate that each named defendant personally
4 participated in the deprivation of his rights. *Iqbal*, 556 U.S. at 676-77. In other words, there
5 must be an actual connection or link between the actions of the defendants and the deprivation
6 alleged to have been suffered by Plaintiff. *See Monell v. Dep’t of Soc. Servs. of City of N.Y.*,
7 436 U.S. 658, 691, 695 (1978).

8 **2. Res Judicata**

9 Res judicata collectively incorporates the doctrines of claim preclusion and issue
10 preclusion. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

11 Under the doctrine of claim preclusion, a final judgment forecloses “successive
12 litigation of the very same claim, whether or not relitigation of the claim raises the
13 same issues as the earlier suit.” *New Hampshire v. Maine*, 532 U.S. 742, 748, 121
14 S.Ct. 1808, 149 L.Ed.2d 968 (2001). Issue preclusion, in contrast, bars
15 “successive litigation of an issue of fact or law actually litigated and resolved in a
16 valid court determination essential to the prior judgment,” even if the issue recurs
17 in the context of a different claim. *Id.*, at 748–749, 121 S.Ct. 1808. By
18 “preclud[ing] parties from contesting matters that they have had a full and fair
19 opportunity to litigate,” these two doctrines protect against “the expense and
20 vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r]
21 reliance on judicial action by minimizing the possibility of inconsistent
22 decisions.” *Montana v. United States*, 440 U.S. 147, 153–154, 99 S.Ct. 970, 59
23 L.Ed.2d 210 (1979).

24 *Id.* “Both doctrines apply to criminal and civil proceedings and both require privity between
25 the parties.” *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008) (internal citation
26 omitted).

27 **B. Application of Claim Preclusion to Plaintiff’s Complaint**

28 Plaintiff’s complaint in this case attempts to relitigate his earlier dismissal against *Buyard*
29 in Case No. 19-cv-235. However, res judicata prohibits him from doing so. *See McClain v.*
30 *Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986) (noting that it was proper for court “to examine
31 the res judicata effect of [a] prior judgment sua sponte”). As noted above, res judicata
32 encompasses both claim preclusion and issue preclusion. *See Taylor*, 553 U.S. at 892. Here, the
33 court focuses on claim preclusion.

34 “Claim preclusion generally refers to the effect of a prior judgment in foreclosing

1 successive litigation of the very same claim, whether or not relitigation of the claim raises the
2 same issues as the earlier suit.” *New Hampshire*, 532 U.S. at 748. “Claim preclusion . . . applies
3 where: (1) the same parties, or their privies, were involved in the prior litigation, (2) the prior
4 litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation
5 was terminated by a final judgment on the merits.” *Central Delta Water Agency v. United*
6 *States*, 306 F.3d 938, 952 (9th Cir. 2002). Here, all three elements are easily met in comparing
7 this case to the prior case against Defendant, Case No. 19-cv-235.

8 The first element is met as both cases involved the same Plaintiff, Petersen, and the same
9 Defendant, Buyard. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d
10 1064, 1081 (9th Cir. 2003) (“We first note that several parties in both actions are identical, and
11 therefore quite obviously in privity.”).

12 In considering the second element—whether there is an identity of claims—the Court
13 considers four factors, with the fourth being the most important:

14 “(1) [W]hether rights or interests established in the prior judgment would be
15 destroyed or impaired by prosecution of the second action; (2) whether
16 substantially the same evidence is presented in the two actions; (3) whether the
two suits involve infringement of the same right; and (4) whether the two suits
arise out of the same transactional nucleus of facts.”

17 *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Each is met here.

18 Here, Defendant’s interest in the prior judgment dismissing Plaintiff’s case against her
19 would be impaired were Plaintiff allowed to relitigate this action. The second, third, and fourth
20 factors are all met as both cases rely on the same evidence to prove the same violation of
21 Plaintiff’s Fourth Amendment rights by having the same cell phones and their contents
22 (including social media data) searched without a warrant pursuant to the same parole
23 conditions. *See United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th
24 Cir. 2011) (concluding that there was an identity of claims where there were “no real
25 differences (if there are any differences at all) between the factual predicates for the two []
26 actions”). Moreover, Plaintiff acknowledges that the two cases concern the same cause of
27 action, as his complaint in this case professes to “ha[ve] found that the court was incorrect” in
28 deciding his prior case and this action appears to be nothing more than an improper attempt to

1 revive his previously dismissed case. (ECF No. 1, p. 4); *see Reyes v. Modesto*, No. 2:14-CV-
2 0795 KJM, 2014 WL 1392944, at *2 (E.D. Cal. Apr. 9, 2014) (concluding that there was an
3 identity of claims where “Plaintiff expressly allege[d] in her complaint that she has filed her
4 complaint in this case against defendants in an attempt to “reopen” . . . a case that was
5 previously dismissed with prejudice due to plaintiff’s failure to effectuate service of process”).

6 Lastly, the final element is met because the prior case was terminated by a final judgment
7 on the merits. *Harris*, 682 F.3d at 1132 (“The [final judgment] factor for claim preclusion is
8 also met, because there was a final summary judgment on the merits in the REAOC
9 litigation.”).

10 **C. Application of Issue Preclusion to Plaintiff’s Complaint**

11 Plaintiff’s complaint, at least as to the May 23, 2017, and July 6, 2017 parole searches of
12 his phones, attempts to relitigate the constitutionality of the searches that the Ninth Circuit
13 found valid in Plaintiff’s criminal appeal. However, issue preclusion, also known as collateral
14 estoppel, prevents him from doing so. *See Brownback v. King*, 141 S. Ct. 740, 747 (2021)
15 (noting that “issue preclusion, also known as collateral estoppel” is a doctrine that “precludes a
16 party from relitigating an issue actually decided in a prior case and necessary to the judgment”).

17 “A plaintiff may be estopped from bringing a civil action to challenge an issue which was
18 distinctly put in issue and directly determined in a previous criminal action.” *Bagley v. CMC*
19 *Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (internal quotation marks and citation
20 omitted); *see White v. City of Pasadena*, 671 F.3d 918, 927 (9th Cir. 2012) (“The rules of claim
21 and issue preclusion apply equally to § 1983 actions in federal courts.”). Because Plaintiff’s
22 criminal case arose in federal court, “federal law controls the collateral estoppel analysis.”
23 *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004).

24 Three factors must be considered before applying collateral estoppel: (1) the issue
25 at stake must be identical to the one alleged in the prior litigation; (2) the issue
26 must have been actually litigated [by the party against whom preclusion is
asserted] in the prior litigation; and (3) the determination of the issue in the prior
litigation must have been a critical and necessary part of the judgment in the
earlier action.

27 *Id.* (alterations in original and internal quotation marks and citations omitted).
28

1 All three factors are met here. Plaintiff, a party in both this case and his criminal case,
2 already litigated the constitutionality of the May 23, 2017, and July 6, 2017 parole searches of
3 his phones in a motion to suppress in his criminal case, with the Ninth Circuit ultimately
4 upholding the constitutionality of the searches. *Peterson*, 995 F.3d at 1068 (concluding that
5 “the parole searches were constitutionally permissible”); *Allen v. United States*, 964 F. Supp.
6 2d 1239, 1261 (D. Nev. 2013) (applying collateral estoppel in a civil case challenging the
7 constitutionality of warrantless entry where the pertinent issue had been decided in a motion to
8 suppress in a criminal case). And the determination of the constitutionality of the searches was
9 a critical and necessary part of the judgment in the criminal case because Plaintiff might not
10 have been found guilty of his crimes had the evidence from the phones been suppressed.

11 **D. The Ninth Circuit’s Decision Controls**

12 Even if Plaintiff’s underlying criminal case did not provide a basis for issue preclusion,
13 the Ninth Circuit’s decision on appeal upholding the legality of the searches controls the
14 outcome of this case and Plaintiff thus fails to state a claim.

15 The Fourth Amendment provides:

16 The right of the people to be secure in their persons, houses, papers, and effects,
17 against unreasonable searches and seizures, shall not be violated, and no Warrants
18 shall issue, but upon probable cause, supported by Oath or affirmation, and
particularly describing the place to be searched, and the persons or things to be
seized.

19 U.S. Const. amend. IV.

20 “[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness,’” and thus,
21 “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal
22 wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” *Riley v.*
23 *California*, 573 U.S. 373, 381-82 (2014) (second alteration in original) (internal quotation
marks and citations omitted). “In the absence of a warrant, a search is reasonable only if it falls
24 within a specific exception to the warrant requirement.” *Id.* at 382.

25 The Ninth Circuit explained in *United States v. Johnson* that “status as a parolee
26 significantly diminishes one’s privacy interests as compared to the average citizen.” 875 F.3d
27 1265, 1273 (9th Cir. 2017). “[P]arole is an established variation on imprisonment of convicted

1 criminals' and granted only 'on the condition that the prisoner abide by certain rules during the
 2 balance of the sentence.' Parolees are thus subject to various state-imposed intrusions on their
 3 privacy, including mandatory drug tests, meetings with parole officers, and travel restrictions."
 4 *Id.* (quoting *Samson v. California*, 547 U.S. 843, 850, 851 (2006)). "California law also
 5 specifically provides that all parolees shall be 'subject to search or seizure by a probation or
 6 parole officer or other peace officer at any time of the day or night, with or without a search
 7 warrant or with or without cause.'" *Johnson*, 875 F.3d at 1274. Thus, despite the importance of
 8 cell phone privacy, and the amount and character of data that can be contained in or accessed
 9 through it, "and the corresponding intrusiveness of a cell phone search," a warrantless search of
 10 a parolee's cell phone pursuant to applicable state law is not unreasonable and does not violate
 11 the Fourth Amendment. *See id.* at 1274-75.

12 Here, Plaintiff was specifically informed that he and any property under his control "are
 13 subject to search and seizure by a probation officer . . . at any time . . . with or without a
 14 warrant with or without cause." (ECF No. 1, p. 5). Accordingly, in upholding the
 15 constitutionality of the May 23, 2017, and July 6, 2017 parole searches, the Ninth Circuit relied
 16 on *Johnson* and Plaintiff's status as a parolee to conclude that Plaintiff had a diminished
 17 privacy interest:

18 Peterson, a California parolee, had the same diminished privacy interest, and the
 19 State of California had the same substantial interest in supervising parolees as
 20 discussed in *Johnson*. *See id.* at 1273-74. Peterson agreed that as a parolee he and
 21 his property could be searched at any time with or without a warrant. Peterson
 22 specifically agreed not to possess a cell phone with a camera, use social media
 sites, or possess "electronic media" displaying sexually explicit content. Finally,
 he consented to "announced or unannounced examination and/or search of [his]
 23 electronic devices." The district court, therefore, appropriately denied Peterson's
 motion to suppress with respect to the parole searches. *See id.* at 1273-74.

24 *Peterson*, 995 F.3d at 1068.

25 The Ninth Circuit's holding in this case is binding precedent and resolves Plaintiff's
 26 challenge to all the searches of his various cellphones at issue in this civil case. *Gonzalez v.*
27 Arizona, 677 F.3d 383, 390 n. 4 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council*
28 of Arizona, Inc., 570 U.S. 1 (2013) (noting that "a published decision of [the Ninth Circuit]
 constitutes binding authority"). Simply put, Defendant's seizures and searches of Plaintiff's cell

1 phones and the search of their content fall within the terms and conditions of Plaintiff's parole,
2 under which conditions he had a diminished privacy interest.

3 While Plaintiff recognizes that the Ninth Circuit concluded that the parole searches
4 were valid, he states that there was no discussion of cloud data and thus the legality of the
5 search of his social medial platforms was "not necessarily decided by the Ninth Circuit." (ECF
6 No. 12).

7 Although the Ninth Circuit did not discuss in detail the searches of the social media
8 platforms, it acknowledged Plaintiff's argument: "Peterson argues that the parole searches were
9 not authorized because his parole conditions did not unambiguously include cell phones *and*
10 *their content* as property subject to search." *Peterson*, 995 F.3d at 1067 (emphasis added).
11 Moreover, in rejecting Plaintiff's argument, the Court made clear that his diminished privacy
12 interest and his agreement to the parole conditions reached his social media accounts, rejecting
13 his attack on the validity of the searches after specifically noting that "Peterson specifically
14 agreed not to possess a cell phone with a camera, *use social media sites*, or possess "electronic
15 media" displaying sexually explicit content. *Id.* at 1068 (emphasis added). Thus, the Ninth
16 Circuit's reasoning applies here and Plaintiff's Fourth Amendment claims fail on the merits.

17 **E. Application of *Heck v. Humphrey* to Plaintiff's Complaint**

18 Additionally, under *Heck v. Humphrey*, 512 U.S. 477 (1994), a § 1983 plaintiff seeking
19 to bring a claim for damages which, if successful, would necessarily imply the invalidity of his
20 conviction or sentence must first demonstrate that the conviction or sentence was reversed,
21 expunged, or otherwise invalidated. *Id.* at 486-87; *see Muhammad v. Close*, 540 U.S. 749, 750-
22 51 (2004) (noting that claims which, if successful, would necessarily imply the invalidity of a
23 conviction or sentence must be brought by way of a petition for writ of habeas corpus). Here, as
24 noted previously, Plaintiff's motion to suppress the evidence seized from the Unimax and LG
25 cell phones during the parole searches was denied in Plaintiff's underlying criminal case and
26 that decision was affirmed on appeal.

27
28

1 Plaintiff pled guilty and conditioned his right to appeal the suppression issue.³ If Plaintiff
2 were successful in the present § 1983 action challenging the constitutionality of the parole
3 searches of the Unimax and LG cell phones, that success would necessarily imply the invalidity
4 of Plaintiff's conviction in the criminal case because his conviction was ultimately based on the
5 evidence obtained from the Unimax and LG cell phones. (*See United States v. Peterson*, No.
6 1:17-cr-255-LJO-SKO (ECF No. 1 – indictment; 50 – plea agreement)). Thus, Plaintiff's
7 claims in this § 1983 action related to the parole searches of the Unimax and LG cell phones
8 are barred by *Heck* as a result of Plaintiff's convictions in the criminal case. *See* 512 U.S. at
9 486-87.

10 **VII. CONCLUSION AND RECOMMENDATIONS**

11 Plaintiff's complaint is barred by res judicata and also fails to state any cognizable claim.
12 Additionally, leave to amend should be denied based on the futility of amendment.

13 Based on the foregoing, IT IS ORDERED that Plaintiff's motion to proceed with action
14 (ECF No. 12) is GRANTED.

15 Furthermore, IT IS RECOMMENDED that:

16 1. This action be DISMISSED, with prejudice, based on res judicata and Plaintiff's
17 failure to state a claim upon which relief may be granted under § 1983; and
18 2. The Clerk of Court be directed to close this case.

19 These findings and recommendations are submitted to the district judge assigned to the
20 case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-one (21) days after
21 being served with these findings and recommendations, Plaintiff may file written objections with
22 the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and
23 Recommendations." Plaintiff is advised that failure to file objections within the specified time

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26 ³ Regarding *Heck*'s application to guilty pleas, the Ninth Circuit recently concluded that "[w]hether the
27 accused wishes to proceed to trial or enter a guilty plea is not the defining factor of *Heck*'s application.
Instead, the relevant inquiry is whether the record contains factual circumstances that support the
underlying conviction . . . , not whether the conviction was obtained by a jury verdict or a guilty plea."
28 *Lemos v. Cty. of Sonoma*, 5 F.4th 979 (9th Cir. 2021).

1 may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
2 2014) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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4 IT IS SO ORDERED.
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6 Dated: August 18, 2021

7 /s/ *Eric P. Gross*

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10 UNITED STATES MAGISTRATE JUDGE
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